IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STACEY FOSTER and	:	
CONSTANCE FOSTER, h/w	:	CIVIL ACTION
	:	
v.	:	NO. 05-CV-1999
	:	
THE HOME DEPOT INC.,	:	
HOME DEPOT USA, INC.	:	

SURRICK, J. **FEBRUARY 24, 2006**

MEMORANDUM & ORDER

Presently before the Court is Plaintiffs Stacey Foster and Constance Foster's Motion to Remand Filed Pursuant To 28 U.S.C.A. § 1447 (Doc. No. 2). For the following reasons, the Motion will be denied.

I. BACKGROUND

This case arises out of an incident that occurred on October 9, 2002, at Home Depot Store No. 1221 located in New York, New York when Plaintiff Stacey Foster (hereinafter "Plaintiff") "was struck by a product which fell from a shelf approximately twenty feet from the ground." (Defs.' Notice of Removal, Doc. No. 1 ¶ 8.) (Resp. to Mot. to Remand, Doc. No. 3 at Ex. 1 ¶ 4.) Plaintiff alleges that Defendants, The Home Depot, Inc. ("Home Depot") and Home Depot USA, Inc. ("Home Depot USA"), "carelessly and negligently allowed a dangerous and defective condition" to exist on the premises which resulted in the product falling on him. (Doc. No. 3 at Ex. 1 ¶ 6.) Plaintiff alleges that he suffered the following injuries as a result of the incident, "which are or may be serious and permanent": disc injuries, lumbar myofascitis, sciatic neuritis, a right shoulder strain and sprain, and other injuries that may be diagnosed in the future. (*Id*. ¶ 13.) In addition, Plaintiff claims that he has incurred, or will incur, damages caused by the

accident, including the cost of medical care, loss of present and future earnings, and pain and suffering. (*Id*. ¶¶ 13-18.) Constance Foster, Stacey Foster's wife, also asserts a derivative claim for loss of consortium. (*Id*. ¶¶ 19-20.)

Plaintiff filed a Complaint on July 27, 2004 in the Court of Common Pleas of Philadelphia County.[1] (Doc. No. 1 ¶ 1.) Stacey and Constance Foster are residents of Pennsylvania. (*Id*. ¶ 5.) Home Depot and Home Depot USA are incorporated in Delaware and maintain their principal place of business in Georgia. (*Id*. ¶ 6.) In the Complaint, Plaintiff seeks damages "in an amount not in excess of the arbitration limits, plus interest and costs."[2] (Compl. at 5-6.) The arbitration limits in the Court of Common Pleas of Philadelphia County are $50,000.[3]

On March 22, 2005, the parties underwent compulsory arbitration. (Pls.' Mot. To Remand, Doc. No. 2 ¶ 10.) The arbitrators awarded damages in the amount of $40,000 ("the Arbitration Award"). (*Id*.) On April 21, 2005, at approximately 10:30 a.m., Defendants filed a Notice of Appeal from the Arbitration Award. (*Id*. ¶ 11.) Later that same day, at approximately 4:15 p.m., Plaintiff filed a Notice of Appeal from the Arbitration Award. On April 27, 2005, Defendants filed a Notice of Removal pursuant to 28 U.S.C. § 1441 based upon diversity

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[1] Philadelphia Court of Common Pleas, Case No. 004033, July Term 2004.

[2] We note that for this case to be referred to compulsory arbitration, Plaintiffs Stacey and Constance Foster together could not seek more than $50,000. *See Flynn v. Casa Di Bertacchi Corp.*, 674 A.2d 1099, 1105 (Pa. Super. Ct. 1996). In any event, for purposes of meeting the amount in controversy requirement of diversity jurisdiction, Stacey Foster's claim cannot be aggregated with that of his wife. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291, 294-95 (1973), *superseded by statute on other grounds*, 28 U.S.C. § 1367, Pub. L. No. 101-650, 104 Stat. 5113.

[3] Under 42 Pa. Cons. Stat. § 7361, matters in which the amount in controversy is less than $50,000 will be automatically referred to arbitration.

jurisdiction. (Doc. No. 1.) On May 25, 2005, the instant Motion to Remand pursuant to 28 U.S.C. § 1447 was filed.

II. LEGAL STANDARD

Under 28 U.S.C. § 1441(a), a defendant in a state court action may remove the case to federal court if the federal court could have originally exercised jurisdiction over the matter. 28 U.S.C. § 1441(a). A case removed to federal court shall be remanded to state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction" over the claim. 28 U.S.C. § 1447(c). When, as here, the parties are citizens of different states, this Court has diversity jurisdiction if the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). The removing party bears the burden of proving that federal subject matter jurisdiction exists. *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004). A motion for remand will be granted if, "from the face of the pleadings, it is apparent to a legal certainty that the plaintiff cannot recover" at least the statutory minimum amount in controversy. *Id*. at 397 (discussing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)); *see also* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3725 (3d ed. 1998) (the Supreme Court's legal certainty test in *Red Cab Co.* "requires the defendant merely to show that it does *not* appear to a legal certainty that the amount in controversy falls below the applicable jurisdictional amount"). Because § 1441 is strictly construed against removal, *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), all doubts about whether a plaintiff satisfies the amount in controversy requirement must be resolved in favor of remand. *Samuel-Bassett*, 357 F.3d at 403.

III. LEGAL ANALYSIS

In the Motion to Remand, Plaintiff argues that Defendants failed to timely remove this matter. (Doc. No. 2 ¶ 22.) Section 1446(b) of Title 28 states in relevant part that "notice of removal . . . shall be filed within thirty days after the receipt by the defendant . . . of a copy of the initial pleading setting forth a claim for relief upon which such action or proceeding is based." 28 U.S.C § 1446(b). However, where the initial pleading does not give rise to federal jurisdiction, "notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper[4] from which it may be ascertained that the case is one which is or has become removable." *Id*.

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[4] The court in *Efford v. Milam*, 368 F. Supp. 2d 380 (E.D. Pa. 2005), examined the definition of "other paper" and its interpretation by other federal courts, noting that the Third Circuit has not yet defined the term as it is used in 28 U.S.C. § 1446(b). *Id.* at 385-86. However, the Fifth, Sixth and Tenth Circuits have determined that deposition transcripts constitute "other paper." *See S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996); *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 465-66 (6th Cir. 2002); *Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1078 (10th Cir. 1999). The Tenth Circuit has also held that answers to written interrogatories satisfy the definition of "other paper." *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998). Likewise, several courts have concluded that correspondences between litigants qualify as "other paper." *See Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 762 (5th Cir. 2000); *Broderick v. Dellasandro*, 859 F. Supp 176, 180 (E.D. Pa. 1994); *Rahwar v. Nootz*, 863 F. Supp. 191, 192 (D.N.J. 1994). In *Broderick*, the court concluded that correspondence constituted "other paper," noting that under § 1446(b), the running of the thirty-day removal period begins "'once the defendant receives actual notice that the case has become removable, which may be communicated in a formal or informal manner.'" *Broderick*, 859 F. Supp. at 178 (quoting 14C Wright et al. § 3732). In determining whether a document triggers the thirty-day removal period, the *Efford* court adopted the Fifth and Tenth Circuits' reasoning that (1) the document must be "'*a voluntary act of the plaintiff* which effects a change rendering a case subject to removal which has not been removable (by defendant) before the change,'" *Efford*, 368 F. Supp. 2d at 385 (quoting *DeBry v. Transamerica Corp.*, 601 F.2d 480, 487 (10th Cir. 1979)), and (2) such document must make it "'unequivocally clear and certain' that federal jurisdiction lies." *Id.* (quoting *Bosky v. Kroger Tex., L.P.*, 288 F.3d 208, 212 (5th Cir. 2002)).

Plaintiff asserts that Defendants filed their Notice of Removal well over thirty days after they ascertained that Plaintiff's claim was removable. Plaintiffs argue that Defendants should have known that the value of Plaintiff's claim exceeded the $75,000 jurisdictional threshold from, among other things, the nature of the injuries set forth in the Complaint and the various materials received in discovery. (Doc. No. 2 at 11-12.) Plaintiff argues that the discovery responses qualify as "other paper" within the meaning of § 1446(b), citing *Cabibbo v. Einstein/Noah Bagel Partners, L.P.*, 181 F. Supp. 2d 428 (E.D. Pa. 2002), in support of this position.

Home Depot and Home Depot USA argue that this action was timely removed because it was not removable prior to April 21, 2005, the date on which Plaintiff and Defendants each filed their Notices of Appeal from the Arbitration award. (Doc. No. 3 at 5-6.) Defendants argue that Plaintiff's Complaint sought damages "in an amount not in excess of the arbitration limits." This meant that Plaintiff could not recover more than $50,000. Defendants contend that had they attempted to remove this action when it was first instituted, it would have been remanded for lack of subject matter jurisdiction. (*Id*.) Defendants waited until after they and Plaintiff had appealed the arbitration award because the appeals established that the amount in controversy was no longer limited to the arbitration maximum of $50,000, but rather had the potential, based on the value of the injuries claimed, to exceed $75,000. Specifically, Defendants argue that Plaintiff's Notice of Appeal constituted "other paper" as contemplated by § 1446(b), thereby triggering the statute's thirty-day removal period. (*Id*. at 10.)

Courts of this district have consistently held that cases subject to compulsory arbitration under Pennsylvania law may not be removed for lack of federal jurisdiction. *See O'Toole v.*

State Farm Cas. Co., No. Civ. A. 03-CV-5442, 2004 WL 1126023, at *1 (E.D. Pa. May 20, 2004) (remanding to the Court of Common Pleas for Philadelphia County where Plaintiffs sought damages "not in excess of $50,000"); *see also Nelson v. Kmart Corp.*, No. Civ. A. 96-2411, 1996 WL 257343, at *2 (E.D. Pa. May 14, 1996) ("[T]he mere possibility that plaintiff may appeal an arbitration award and ultimately recover more than the $50,000 demand is too remote to confer jurisdiction."). Pennsylvania law limits damages recoverable in compulsory arbitration to $50,000. 42 Pa. Cons. Stat. § 7361(b)(2)(i) (2005). Therefore, it appears to a legal certainty in such cases that the amount in controversy is below the threshold for diversity jurisdiction. *O'Toole*, 2004 WL 1126023, at *1. This is true even where the value of the underlying claim is actually greater than the jurisdictional threshold. *See* 14B Wright et al. § 3702, at 46-48 ("Plaintiff is the master of his or her claim; if plaintiff chooses to ask for less than the jurisdictional amount, only the sum actually demanded is in controversy. Accordingly, subject matter jurisdiction is absent even though the underlying claim is of a value exceeding the statutory minimum."); *see also Red Cab Co.*, 303 U.S. at 294.

In this case, Defendants timely filed their Notice of Removal pursuant to § 1446(b). Had Defendants attempted to remove this action prior to April 21, 2005, the case would have been remanded. In his initial Complaint, Plaintiff sought relief "in an amount not in excess of the arbitration limits, plus interest and costs." (Compl. at 5-6.) The case was designated for compulsory arbitration, and the recoverable damages were strictly limited to $50,000. Notwithstanding the nature and severity of Plaintiff's injuries, Plaintiff could not have recovered more than $50,000. Prior to April 21, 2005, it appeared to a legal certainty that the value of

Plaintiff's claim was less than the jurisdictional threshold of this Court, and the case was not removable. *See O'Toole*, 2004 WL 1126023, at *1.

On April 21, 2005, both Plaintiff and Defendants appealed from the Arbitration Award and the jurisdictional limitation imposed by § 7361 no longer applied. This gave rise to the possibility of diversity jurisdiction. *See* 42 Pa. Cons. Stat. § 7361(d) (providing for a trial *de novo* upon appeal from an arbitration award by any party). These appeals rendered this case subject to removal and, in conjunction with the injuries plead in Plaintiff's Complaint, the discovery that Defendants received in the form of medical bills and reports, and the deposition of Plaintiff, constituted "other paper" within the meaning of the removal statute. They alerted Defendants to the fact that the verdict risk in this case now exceeded $75,000. *See Carroll v. United Air Lines, Inc.*, 7 F. Supp. 2d 516, 521 (D.N.J. 1998) ("[A]llegations of severe injuries along with pain and suffering will alert the defendant that an amount in excess of the jurisdictional amount is at issue.") (quoting *Turner v. Wilson Foods Corp*., 711 F. Supp. 624, 626 (N.D. Ga. 1989)). Interestingly, Plaintiff's submissions support this conclusion, affirmatively asserting that Defendants should have known from the outset that the value of Plaintiff's claim exceeded $75,000.

Defendants refer to Plaintiff's arguments in favor of remand and assert that Plaintiff acted in bad faith by initially demanding damages in an amount not in excess of $50,000. Plaintiff argued that Defendants should have known that the value of this case exceeded $75,000 based upon the allegations in the Complaint with regard to the severity of the injuries sustained by Plaintiff, the medical records which Defendants received from Plaintiff, the medical bills which exceeded $25,000, and Defendants' deposition of Plaintiff. "Plaintiffs are entitled to avoid

federal court by seeking less than the jurisdictional amount, but they are not entitled to toy with the federal courts for strategic or tactical reasons." *Mercante v. Preston Trucking Co.*, No. Civ. A. 96-5904, 1997 WL 230826, at *4 (E.D. Pa. May 1, 1997) (internal quotation omitted). While we need not determine whether there was bad faith in order to dispose of this Motion, Defendants' assertion that Plaintiff was attempting to manipulate the system appears to have merit. We see little reason except avoidance of removal for Plaintiff to limit damages to $50,000 when he concedes that the value of the claim exceeds $75,000.[5] Plaintiff's late afternoon appeal of the $40,000 Arbitration Award on the last day of the appeal period also seems to support Defendants' contention.

Based upon the foregoing, Plaintiff's Motion to Remand will be denied.

An appropriate Order follows.

[5] Plaintiff's arguments that "[f]rom the Plaintiff's point of view, the value of this case was questionable not because of the medical reports or any liens, but because of the Plaintiff's own character" and that Plaintiff's "believability before a jury was questionable" are unusual but unpersuasive. (Pls.' Reply to Defs.' Resp., Doc. No. 4 at 1.)

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THE HOME DEPOT INC.,	:	
HOME DEPOT USA, INC.	:	

ORDER

AND NOW this 24th day of February, 2006, upon consideration of Plaintiffs Stacey Foster and Constance Foster's Motion To Remand (Doc. No. 2) and all papers submitted in support thereof and in opposition thereto, it is hereby ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S/R. Barclay Surrick

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R. Barclay Surrick, Judge